Nos. 01-20-00004-CR and 01-20-00005-CR

In the Court of Appeals
For the First District of Texas
At Houston

———♦———

Nos. 1657519 and 1657521
In the 338th District Court
Of Harris County, Texas

———♦———

***Ex parte* Joseph Eric Gomez**
Appellant

———♦———

Motion to Stay Mandate
Pursuant to Rule 31.4

———♦———

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The State filed a petition for discretionary review within 15 days of this Court's judgment reducing the amount of bail. Rule 31.4 allows the State to seek a stay of this Court's mandates

This Court issued its opinions and mandates in these cases at the same time on Friday, August 7. On August 10, the State filed a petition for discretionary review of this Court's decision with the Court of Criminal Appeals (Appendices A and B). The State asks this Court to withdraw and stay its mandates.

Rule of Appellate Procedure 31.4 allows a party to seek a stay of the mandate in a case "when a court of appeals reverses the trial court's judgment in a bail matter … and thereby grants or reduces the amount of bail." That has occurred in this case—this Court's judgment reduced the required bail in this case from $150,000 to $40,000.

A Rule 31.4 motion to stay the mandate is timely if it is filed within 15 days of when judgment is rendered. The motion must shows that the party "in good faith intends to seek discretionary review." The party seeking a stay must attach to its motion a copy of the petition for review.

The State has appended its petition for disrectionary review to this motion, as well as the email receipt showing when it was submitted to the Court of Criminal Appeals. The State represents this petition was filed in good faith and, as Rule 31.4 requires, "show[s] reasons why the

Court of Criminal Appeals should review the appellate court judgment."

The State has complied with Rule 31.4 and asks this Court to withdraw and stay its mandates.

This Court should deny the appellant's additional bail request pending appeal.

The appellant has asked this Court to "issue an order directed to the trial court (the habeas court) to allow Appellant to remain free on his current bonds pursuant to Article 44.35 until final resolution of the State's intended appeal." (Appellant's Response to State's Emergency Motion to Withdraw Mandate (filed August 9) at 8).

Code of Criminal Procedure Article 44.35 allows that a defendant who is held in custody pending an appeal from the denial of habeas relief "shall be allowed bail by the court or judge so remanding the defendant, except in capital cases where the proof is evident."

Article 44.35 entitles habeas appellants to bail, not to a low bail or a bail they can necessarily make. *Compare* TEX. CODE CRIM. PROC. 44.35 *to* TEX. CODE CRIM. PROC. art. 17.151 (jailed defendant "must be released either on personal bond or by reducing the amount of bail required" if State not ready for trial by stated deadlines). Article 44.35

no more guarantees the right to pretrial release than do ordinary bail procedures. *See Ex parte Baugh*, 12-08-00367-CR, 2009 WL 387103, at *4 (Tex. App.—Tyler Feb. 18, 2009, no pet.)(mem. op. not designated for publication)(affirming trial court's decision to set habeas applicant's bail at $500,000 pending appeal of habeas application).

At all relevant times the appellant has been allowed bail, and there is no reason to believe he will not be allowed bail pending the State's petition for discretionary review. The appellant has cited no authority, nor is the State aware of any, showing this Court has the power to set the specific amount of bail at this point in the habeas appeal.

Conclusion

This Court should stay its mandates.

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Certificate of Compliance and Service

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Date: August 10, 2020

Appendix A

State's Petition for Discretionary Review

PD-_____-20 and PD-____-20
In the Court of Criminal Appeals of Texas
At Austin

———♦———

Nos. 01-20-00004-CR and 01-20-00005-CR
In the Court of Appeals
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Appellant

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State's Petition for Discretionary Review

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Oral Argument Requested

Statement Regarding Oral Argument

The First Court's opinion has declared illegal a practice that is fairly common in Harris County, and probably around the State. By its terms, Article 17.09 allows a trial court to raise or lower a bailed defendant's bond that was previously set by a magistrate if the trial court determines the amount is too high or too low. The First Court's holding here prohibits this practice unless the trial court makes findings on the record to support its decision. That requirement has no basis in statute and impinges on the trial court's discretion to manage the bail of defendants it is assigned to supervise.

This is an important case because of the regularity with which trial courts use Article 17.09 to adjust bond amounts.[1]

The State requests oral argument.

[1] The appellant admitted documents from nine other cases seeming to show this practice over the prior year.

Identification of the Parties

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Habeas Court:

> **Ramona Franklin**, presiding judge

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Statement of the Case

The appellant was arrested and charged by complaint with burglary of a habitation and assault of an individual with whom he had a dating relationship by impeding breath. (1 Supp. CR 4; 2 Supp. CR 4).[2] A hearing officer set bail at $25,000 for the burglary and $15,000 for the assault. (1 CR 19, 22). The appellant posted bail bonds in those amounts. (1 CR 29, 32). At his first court appearance, the district judge to whose court the case was assigned determined the amount of the bonds was insufficient, revoked those bonds, and ordered bail be set at $75,000 for each case. (1 CR 39, 41).

The appellant filed a pretrial application for habeas corpus relief, asking the trial court to reinstate his bonds. (1 CR 8-9).[3] After a hearing, the trial court denied relief. (2 RR 23-24). The trial court certified the appellant's right of appeal and the appellant filed notices of appeal. (1 CR 68, 69; 2 CR 68, 69).

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[2] The State will describe the clerk's records for these two cases as though they were sequential volumes. The record for No. 1657519 (the burglary case) will be 1 CR and 1 Supp. CR. The record for No. 1657521 (the assault case) will be 2 CR and 2 Supp. CR. When documents are identical in the records the State will cite 1 CR and 1 Supp. CR.

[3] For whatever reason, the writ application appears in the original clerk's records and then twice in the supplemental records. (*See* 1 Supp. CR 23-28, 78-84). There's also a shorter "Application for Writ of Habeas Corpus Seeking Bail Reduction," filed three days before the other application, in the supplemental records. (*See* 1 Supp. CR 15-16).

A panel of the First Court of Appeals reversed the denial of relief and "render[ed] judgment granting the writ and reinstating [the appellant's] prior bonds." *Ex parte Gomez*, Nos. 01-20-00004-CR and 01-20-00005-CR, Slip Op. at 19 (Tex. App.—Houston [1st Dist.], August 7, 2020 pet. filed)(mem. op. not designated for publication). The First Court issued its mandates in the cases contemporaneous with the opinion. *Ibid*. The State has filed a motion with that Court to withdraw its mandates, and a motion with this Court asking it to order the First Court to stay its mandates pending review of the case.

Ground for Review

The First Court erred by holding that a trial court cannot find a bond "insufficient in amount" once a defendant has posted the bond. Whether the bond is "insufficient in amount" is not a question of whether the defendant made a bond equal to the bail amount, it is a question of whether the required amount should be set higher.

Reasons to Grant Review

In Harris County and much of the state it is common for hearing officers or magistrates to set a defendant's initial bail amount. Once a case is assigned to a trial court, Code of Criminal Procedure Article 17.09 allows the judge of that court to revoke a bailed defendant's

bond and require him to give a new bond if the trial court believes the amount of the bond is excessive or insufficient.

The First Court's interpretation of Article 17.09 strips away much of the trial court's discretion, and binds the trial court to the bail determinations of hearing officers and other magistrates who are no longer responsible for the case. It is common for trial courts to increase or decrease bail based on Article 17.09, and this is the only appellate opinion interpreting whether they may do so based on a belief that the bail is "excessive or insufficient in amount."

Whether a trial court has discretion to adjust a bailed defendant's bail upwards or downwards based on its belief of what bail should be, or whether the trial court is bound by the bail decision of the prior magistrate, is an important question of state law that this Court should decide.

Statement of Facts

When police arrived at the crime scene, the complainant told officers

> as she woke up, the [appellant] was crouching near her bed. He was wearing all black, wearing a black mask. When she saw him, he got on top of her and start[ed] choking her. Her sister rushed into the room, pushed him off of

her, and then he fled the residence and he was located by officers not far from the residence.

The complainant told [the responding officer] that she located inside the side room of her residence a couple of bottles of urine and some of [the appellant's] personal affects, and that led the complainant…to the reasonable conclusion that [the appellant] was lying in wait hiding in the residence for some time.

(1 RR 4).

Procedural Background

I. Initial Appearance and Habeas Application

A. The appellant made the bonds set by the hearing officer. But the trial court revoked those bonds and set bail at a higher amount.

After his arrest on charges of burglary and assault, by strangulation, of a family member, the State requested that bail be set at $100,000 in each case. (1 CR 19, 22). The hearing officer before whom the appellant first appeared set bail at $25,000 for the burglary charge and $15,000 for the assault case. (1 CR 19, 22). Roughly twenty-nine hours later, before any other court appearance, the appellant obtained bail bonds for both cases. (1 Supp. CR 9-10; 2 Supp. CR 14-15).

Soon after, the appellant made his first appearance before the district judge to whose court his case had been assigned. (1 Supp. CR

146; 1 RR 4). That judge ordered the defendant rearrested and ordered him to obtain new bonds to total $75,000 for each case. (1 Supp. CR 8; 2 Supp CR 13).

A few days later, counsel for the appellant appeared and asked the trial court to reinstate the original bonds. (2 RR 13). The trial court denied this motion. (2 RR 13).

B. The appellant applied for habeas relief, claiming the trial court erred by revoking his original bonds. The trial court denied relief and said its actions were justified by Article 17.09 because it believed the original bonds were insufficient in amount.

The appellant applied for a writ of habeas corpus, alleging he was being held illegally because the trial court was without authority to require him to obtain another bond. (1 CR 4-9). At the writ hearing, the appellant argued that, under Code of Criminal Procedure Article 17.09, once he made bail the trial court could raise the amount of the bail only with "good and sufficient cause," which did not exist in this case. (2 RR 18-19).

The appellant also argued he was denied due process because he did not have notice the trial court would review the amount of his bonds, and he was denied the right to counsel of his choice because

the trial court had appointed a lawyer for him, even though he wanted to retain a different lawyer. (2 RR 19-20). Finally, the appellant argued that to whatever degree the trial court relied on the prosecutor's recitation of the facts of the alleged offense as a basis to raise the appellant's bail it violated the Rules of Evidence. (2 RR 20-21).

The State responded that Article 17.09 gave the trial court the authority to rearrest a defendant and require him to post another bond anytime it determined the current bond was insufficient in amount. (2 RR 21-22). The State also argued that a trial court's decision to review the amount of bail is not a "formal hearing," thus defendants are not entitled to a lawyer. (2 RR 21-22).

The trial court denied relief. (2 RR 24). It explained it believed its action was authorized by Article 17.09, which allows a court to rearrest a defendant and require him to obtain another bond "whenever, during the course of the action, the judge … in whose court such action is pending finds that the bond is … insufficient in amount…." (2 RR 24); TEX. CODE. CRIM. PROC. art. 17.09 § 3. The court described the earlier proceeding as a "bail review hearing." (2 RR 24). The trial court said that at that hearing it "heard the probable cause in this [case] and deemed the original bond was insufficient." (2 RR 24).

II. In the First Court

A. The appellant argued the trial court erred by revoking his bonds without "good or sufficient cause." The State replied that the trial court's determination that the bonds were "insufficient in amount" was sufficient cause.

The appellant raised two points in the First Court. The first argued "the trial court illegally revoked [the appellant's] bonds and raised the bond amounts without justifiable cause." (Appellant's Brief at 3). The second point argued some procedural matters that are not relevant at this point because the First Court did not address them. *See Gomez*, Slip Op. at 2 (declining to reach second point because of resolution of first).

The relevant part of the appellant's brief hinged on Code of Criminal Procedure Article 17.09. That article controls the trial court's management of bail during a criminal trial. Section 2 states the general rule: "When a defendant has once given bail for his appearance in answer to a criminal charge, he shall not be required to give another bond in the course of the same action except as herein provided." TEX. CODE CRIM. PROC. art. 17.09 § 2. Section 3, though, establishes several exceptions to this rule:

> Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pend-

> ing finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

TEX. CODE CRIM. PROC. art. 17.09 § 3.

The appellant's argument was that there was no "good and sufficient cause," as that term has been defined in the case law, to require him to give another bond. (Appellant's Brief at 13-19). The appellant cited cases where appellate courts overturned trial court decisions under Article 17.09 because there was no "good and sufficient cause" for revoking bond. (Appellant's Brief at 15-16 (discussing *Meador v. State*, 780 S.W.2d 836 (Tex. App.—Houston [14th Dist.] 1989, no pet.) and *Ex parte King*, 613 S.W.2d 503 (Tex. Crim. App. 1981)).

The State responded that discussion of "good and sufficient cause" was irrelevant because Article 17.09 allows the trial court to revoke a defendant's bond if it "finds that the bond is … insufficient in amount … *or* for any *other* good and sufficient cause." (State's Brief at 11-15). The State pointed out that the plain text of the statute made the trial court's determination that the bond was insufficient in

amount a standalone basis for revocation that required nothing more. And by referring to "*other* good and sufficient cause[s]," the statute strongly implies that all the things listed before *are* good and sufficient causes. The State pointed out that its interpretation of the statute left the trial court with no more discretion in setting bail than the original hearing officer had—the remedy for excessive bail, whether set by the hearing officer or the trial court, is always through habeas.[4]

The State pointed out that the appellate reversals the appellant cited did not involve cases where, like this one, the trial court explicitly found the bond insufficient in amount. Finally, the State pointed out the importance of allowing trial courts to make bond determinations like the one here because often the prior bond determination was made by a magistrate who is no longer responsible for the case.

In a reply brief, the appellant claimed that by inserting the word "other" in the middle of the statute, the Legislature actually intended to apply the "good and sufficient cause" language to the causes listed earlier in the statute. (Appellant's Reply Brief at 2-3). The appellant rearranged the statute, but even in that version it's still obvious the tri-

[4] The appellant's application did not allege the overall amount of his bail was excessive. The application and appeal have been about whether the trial court could require a second bond after the appellant posted the first.

al court's determination that bond is insufficient is a standalone basis for revocation. (Appellant's Reply Brief at 3).

B. The First Court reversed on an argument not raised in the trial court or argued by the parties. The First Court held that when a defendant makes bail, the bond is necessarily sufficient in amount.

The First Court began its analysis by stating that the trial court made no finding regarding any of the circumstances for revocation in Article 17.09. *Gomez*, Slip Op. at 14. The First Court's analysis does not mention the trial court's determination that the amount of the bonds was insufficient.

In the next paragraph, the First Court treated whether the bonds were "insufficient in amount" as a question of arithmetic, not judgment: "[I]t is undisputed that the bonds were not 'insufficient in amount' to satisfy the amount of bail that was ordered…." *Id.* at 15.

After disposing of the trial court's and State's plain-language argument in two cite-free paragraphs, the First Court spent nearly four pages discussing cases about "other good and sufficient causes." *Id.* at 15-18. Neither the trial court nor the State had invoked any "other good and sufficient cause."

Ground for Review

The First Court erred by holding that a trial court cannot find a bond "insufficient in amount" once a defendant has posted the bond. Whether the bond is "insufficient in amount" is not a question of whether the defendant made a bond equal to the bail amount, it is a question of whether required the amount should be set higher.

The First Court's holding is that when Article 17.09 allows the trial court to determine whether a bond is "insufficient in amount," the only thing a trial court may look at is whether the defendant has posted a bond in the amount of the ordered bail. The State believes that is an incorrect interpretation: "Amount" refers to what the defendant has been ordered to pay, not what he has actually paid.

The State will first show that the First Court's interpretation conflicts with the statutory definition of "bail bond." Second, the First Court's interpretation's is bad statutory construction because it makes part of Article 17.09 meaningless. Third, when a statute allows a judge to determine whether bond is "insufficient in amount," it is a question of prudence—"Is the bail high enough to meet the purposes of bail?"—not a question of mere arithmetic.

I. The definition of "bail bonds" shows that the "amount" of a bond is the amount set by a magistrate or court, not the amount the defendant actually pays.

The First Court recited the statutory definition of "bail bond," though it is not clear how they applied it. *Gomez*, Slip Op. at 10. That definition shows that the First Court misinterpreted what is meant by the "amount" of the bond.

A "bail bond" can be posted in two ways. First, the defendant can obtain sureties to vouch for his court appearance and the amount of bail. TEX. CODE CRIM. PROC. art. 17.02. Second, the defendant "may deposit with the custodian of funds of the court … current money of the United States *in the amount of the bond* in lieu of having sureties signing the same." *Ibid.* (emphasis added).

The First Court's interpretation of Article 17.09 is that the "amount" of a bond is the amount the defendant has actually posted—thus its conclusion it was "undisputed" the bonds were sufficient because they matched the amount of bail. But if that were true, then any sum of money deposited with the court would be a bond, regardless of what a magistrate set bail at.

Article 17.02 shows that the "amount" of the bond determines what the defendant must pay, not the other way around. Article 17.02

supports the State's interpretation of Article 17.09: When a trial court is determining whether a bond is "excessive or insufficient in amount," it is analyzing the amount the bond was set at, not the amount the defendant posted.

II. The First Court construed the phrase "insufficient in amount" in a way that renders parts of the statute meaningless.

Article 17.09, Section 3 is a list of situations where a trial court can require a defendant who has already bailed out of jail to give a second bond. In every Article 17.09 proceeding, the defendant will have already posted a bond that met the required amount. Yet the First Court interpreted Article 17.09 so that the only thing a trial court can consider in whether assessing whether a bond is "insufficient in amount" is whether it met the required amount. Under the First Court's interpretation, the bond will *always* be sufficient in amount at an Article 17.09 proceeding.

Under the First Court's interpretation, the only way a defendant's bonds could be "insufficient in amount" is if the sheriff released a defendant who posted less bond than the trial court required. That seems like an uncommon occurrence, and the State has been unable to

find a case discussing the possibility. No cases citing to Article 17.09 involve such an event.

Article 17.09 also allows a trial court to order a defendant to obtain a new bond when it finds the bond is "excessive … in amount." The most natural reading of this—consistent with the State's interpretation of the statute—is that it allows the trial court to reduce the required bond amount if it determines, after the defendant posted a bond, that the required amount was too high. This might occur in a cash bond situation.

Under the First Court's interpretation of this statute—where "amount" refers to the amount the defendant actually posted, not the amount the trial court required—the bond would be "excessive in amount" only when a defendant posted more bond than the trial court required. That situation is unlikely, and easily solvable without a special statute: refund the overpaid sum.

If these improbable events occurred, both the underpayment and overpayment scenarios are covered elsewhere in Article 17.09: A trial court can require a defendant to give a new bond when it finds the current bond is "defective." Both an underpaid and overpaid bond would fall into that category.

The First Court's interpretation violates one of the cardinal rules of statutory construction, that every word and clause in a statute be given meaning. *See Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). By defining "insufficient in amount" so that it applies only to unlikely situations that are covered by another part of the statute, the First Court has left the phrase without effective meaning.

III. When bail statutes refer to judges or magistrates dealing with whether bail is "sufficient," it refers to the amount at which bail is set, not the amount the defendant has paid.

When looking at whether the amount of bail is "sufficient," an important question to ask is: Sufficient for what? *Cf. Lothrop v. State*, 372 S.W.3d 187, 190 (Tex. Crim. App. 2012)("When discussing whether a particular action is 'necessary,' the relevant inquiry is always: Necessary to what end?").

Article 17.15 lists factors for magistrates to consider when setting bail. That article requires that bail be "sufficiently high to give reasonable assurance that the undertaking will be complied with." TEX. CODE CRIM. PROC. art. 17.15. That article also says the future safety of the victim and the community "shall be considered."

When other statutes require judges to assess whether bail is "insufficient in amount," the logical reading is this is a reference to Article 17.15's sufficiency requirement. That is: Article 17.09 allows a trial court to revoke a bond and require the defendant to get a new bond if it determines the current bond is insufficient in amount to give reasonable assurance that the defendant will show up to court, or to protect the victim and the community.

Two statutes allow judges of this Court, intermediate courts, district courts, and county courts to require defendants to obtain new bonds if, upon affidavit, it appears the current bail[5] is "insufficient in amount." Article 16.16 allows this procedure before indictment, and Article 23.11 allows it after indictment. TEX. CODE CRIM. PROC. arts. 16.16, 23.11.

In AP-77,097, *State v. Singleton*, this Court recently used Article 16.16 to require a defendant to obtain a new bond because it appeared

[5] Articles 16.16. and 23.11 ask whether "bail" is insufficient, but Article 17.09 asks whether "the bond" is insufficient. In this context, this is a distinction without a difference. "'Bail' is the security given by the accused that he will appear and answer before the proper court…" TEX. CODE CRIM. PROC. art. 17.01. Bail "includes a bail bond or a personal bond." *Ibid.* No other type of bail is listed in the Code of Criminal Procedure. If the defendant's bond is insufficient, that means his bail is insufficient; and his bail would be insufficient only if his bond were insufficient.

his then-current bond was insufficient in amount.[6] There was no question Timothy Singleton had made his $500 bond when this Court ordered him to obtain a new bond in the amount of $100,000. So under the First Court's interpretation of what it means for a bond to be "insufficient in amount," this Court erred.

The State believes this Court in *Singleton* and the trial court here have the better understanding of what it means for bond to be "insufficient in amount." It is not, as the First Court held, a question of whether the bond is sufficient to make the required bail—the law does not assign judges questions like, "Is a $40,000 bail bond sufficient to cover a $40,000 bail?" Instead, it is a question of whether the amount of the bond required in a case is sufficient to meet the purposes of bail. That is a prudential question that, within broad constitutional parameters, is given to the sound discretion of judges.

Here, the plain language of Article 17.09 allows the trial court to determine whether the appellant's bond was "insufficient in amount." The First Court erred in limiting the trial court's discretion to determining whether the appellant had bonded out of jail. This Court

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[6] There were no opinions or substantial orders in this case. *See* http://www.search.txcourts.gov/Case.aspx?cn=AP-77,097&coa=coscca. This is obviously not binding precedent, but it is an example of how this Court interpreted the plain meaning of the phrase "insufficient in amount."

should grant review of this important legal question and reverse the First Court's judgment.

Conclusion

The State asks this Court to grant review of the First Court's decision and reverse its judgment.

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Date: August 10, 2018

Appendix

***Ex parte Gomez*, Nos. 01-20-00004-CR and 01-20-00005-CR (Tex. App.—Houston [1st Dist.], August 7, 2020 pet. filed)(mem. op. not designated for publication)**

Opinion issued August 7, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00004-CR

NO. 01-20-00005-CR

EX PARTE JOSEPH GOMEZ, Appellant

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Case Nos. 1657519 & 1657521

MEMORANDUM OPINION

Appellant, Joseph Gomez, appeals the trial court's denial of his application for a writ of habeas corpus, in which he argued that the court abused its discretion by increasing the amount of pretrial bail after he posted a bail bond in an amount set by the magistrate. On appeal, he argues that the court acted impermissibly because there was no showing of good cause for the increase. He also argues Due Process

violations concerning notice, right to counsel, and compliance with the Texas Rules of Evidence. We do not reach Gomez's procedural issues because we agree that the court abused its discretion by requiring additional bail without any showing in the record that such action was authorized by law.

We reverse the trial court's order denying Gomez's application for a writ of habeas corpus, and we render judgment granting his application for habeas relief and order reinstatement of the original bonds that were posted.

BACKGROUND

I. The Criminal Allegations Against Gomez

On November 13, 2019, Deer Park police arrested 27-year-old Joseph Gomez and charged him with burglary of a habitation as a first-degree felony and the second-degree felony offense of assault on a family member—impeding breathing.[1] The complaints alleged that he entered the home of Stephanie Woitena, a woman with whom he had a dating relationship, without consent and committed assault on a family member "by impeding the normal breathing and circulation of blood" "by applying pressure to [her] throat and applying pressure to [her] neck."

[1] *See* TEX. PENAL CODE § 30.02(d) (burglary of a habitation; first-degree felony); *id.* § 22.01(b)(2)(B) (assault on a family member impeding breathing; third-degree felony).

II. Three Hearings Regarding Pretrial Detention and Conditions of Release

A. The hearing before the magistrate (Thursday, November 14, 2019)

Early the next morning, Gomez appeared before a magistrate.[2] The district attorney provided the probable cause allegations and asked the magistrate for an order for emergency protection of Woitena and that bail be set at $100,000 on each charge. The State also filed a motion for the trial court to issue a no-contact order.

Gomez told the magistrate that he had an attorney and would not seek court appointed counsel in the district court, but he expressly consented to be represented by the public defender for the limited purpose of the hearing before the magistrate. The public defender asked for bail to be set at $20,000 on the charge of burglary of a habitation and $10,000 on the charge of assault on a family member. The public defender argued that Gomez was a below average risk: he had no prior convictions; he had not previously failed to appear for court; and he had no pending charges. Gomez was 27 years old, worked as server at a restaurant earning about $700 per month, lived with his parents, and attended San Jacinto Community College. Gomez had lived in the Houston area his entire life, and he had access to a vehicle for transportation to court.

[2] A video recording of this hearing appears in the appellate record.

The magistrate found that probable cause for further detention existed and entered orders setting bail at $25,000 on the burglary of a habitation charge and $15,000 on the assault on a family member charge. The magistrate denied a personal bond, noting that although Gomez's public safety assessment indicated a below average risk, the facts and circumstances alleged were violent and suggested a high risk to Woitena's safety. The magistrate also granted an order of emergency protection.

B. The hearing before the trial court (Friday, November 15, 2019)

Gomez's father obtained bail bonds through a surety, and Gomez was released the following morning, November 15, 2019. As instructed in the bond papers, Gomez went directly to the court for a hearing. There is no reporter's record of this hearing, but Gomez's unsworn declaration and the trial court's comments at later hearings provide some information about what happened in court that day.[3] According to Gomez, the trial court called him to the bench. Although Gomez had previously indicated that he did not want appointed counsel in the district court, according to Gomez the trial court appointed an attorney who was present in the

[3] We use the term unsworn declaration as a term of art referring to a document that may be used in lieu of an affidavit. *See* TEX. CIV. PRAC. & REM. CODE § 132.001; *see also id.* §14.001(6) (defining unsworn declaration in certain kinds of litigation brought by inmates). An unsworn declaration may be used to satisfy the oath requirement for a petition for writ of habeas corpus. *See Ex parte Johnson*, 811 S.W.2d 93, 97 (Tex. Crim. App. 1991).

courtroom to represent him for the limited purpose of that hearing. The district attorney stated the probable cause allegations that had been presented to the magistrate the previous day. The trial court granted the no-contact order. Without any further motion from the State, the court revoked the bonds that had been posted, and ordered that Gomez be rearrested and remanded into custody with bonds set at $75,000 on each charge. Gomez was immediately taken into custody.

Later that day, Gomez retained counsel, who requested a hearing. The hearing was set for the following Monday, November 18, 2019.

C. The second hearing before the trial court (Monday, November 18, 2019)

At the Monday, November 18, 2019 hearing, the court asked the State to share the same probable cause facts that had been shared at the hearing the previous Friday. Without objection, the prosecutor complied. Defense counsel argued that, although the Rules of Evidence were applicable, the court heard only hearsay evidence from the State before revoking Gomez's bonds. Counsel read an affidavit from Gomez's father into the record. The father attested to Gomez's good character for nonviolence; derided the complainant; and averred that Gomez lived at home with him, that he and his wife financially supported Gomez, and that Gomez was a full-time student. The father's affidavit stated that he had exhausted the family's funds posting the initial bail bonds and that he brought Gomez to court on November 15,

2019 after picking him up from jail.[4] The father also attested that, if released, Gomez would live with his wife and him and that he would be in court with Gomez for every setting. Finally, Gomez's father asked the court to reinstate the prior bonds and release Gomez pending trial.

The court denied the motion to reinstate the previous bonds and release Gomez. In doing so, the court stated that, at the hearing on November 15, 2019, it heard probable cause and "followed case law." The court also said: "That is not just the only consideration. There are many factors that court has to weigh in making a determination of a bond." The court did not make any findings of fact.

III. Gomez filed an application for writ of habeas corpus.

Gomez filed an application for writ of habeas corpus, in which he alleged that the $75,000 bonds were excessive and that he was unable to post bonds in that amount because he was a full-time student at San Jacinto College, he was supported

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[4] Specifically, the father averred:

> We financially support Joseph since he is in school. Joseph has nothing to contribute to posting his bond. I personally posted the previous bonds that were set at 15,000 and 25,000. I paid the percentage required by the bonding company. When Joseph was released on November 15, I picked him up from the jail and took him straight to the courthouse. I used all the available funds that my family had to post those bonds. The money was lost when the bonds were revoked on the 15th after he had appeared in court.
>
> We are unable to post the bonds for Joseph as they are. My family does not have the means to post additional bonds of $75,000. We do not have the funds and will not have the funds.

by his parents, he owned no property, and he had no income. He also alleged that his parents had exhausted their resources posting the original bonds. Gomez argued that the court acted illegally by revoking his bonds and increasing his bail because there was no "cause" to justify the action. He further argued that the court violated his Due Process rights in regard to notice, right to counsel, and conduct of the proceeding without regard to the Texas Rules of Evidence.

On December 10, 2019, the court held a hearing on Gomez's application for a writ of pretrial habeas corpus. At the hearing, Gomez's evidence included the magistrate's bail orders, the bail bonds, and his unsworn declaration regarding the November 15, 2019 hearing. Gomez's father testified consistently with his affidavit about Gomez's good character and the exhaustion of resources available to pay for bail.

The trial court denied the application for pretrial habeas corpus, again without findings of fact or conclusions of law, and Gomez appealed.

ANALYSIS

In his first issue, Gomez argues that the trial court erred by revoking his bonds without "good and sufficient cause" as required by article 17.09 of the Texas Code of Criminal Procedure. Gomez argues that the court acted without regard to the law when it ordered his rearrest, revoked his bonds, and raised the amount of bail from a combined total of $40,000 to $150,000.

I. Standards of Review for Habeas Corpus and Statutory Construction

We review a trial court's decision to grant or deny habeas corpus relief for an abuse of discretion. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006); *see Ex parte Rubac*, 611 S.W.2d 848, 849–50 (Tex. Crim. App. 1981) (reviewing bail pending appeal for abuse of discretion); *Montalvo v. State*, 315 S.W.3d 588, 592 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (same). When, as here, a habeas appeal concerns pretrial bail, we may not simply conclude that the trial court did not "rule arbitrarily or capriciously." *Montalvo*, 315 S.W.3d at 593. Rather, we must "measure the trial court's ruling against the relevant criteria by which the ruling was made." *See id.*; *see also Ex parte Dixon*, PD-0398-15, 2015 WL 5453313, at *2 (Tex. Crim. App. Sept. 16, 2015) (not designated for publication) ("Habeas courts determine the bearing of the evidence on the relevant bail criteria *only* in the first instance. On appellate review, it is the duty of the reviewing court to measure the ultimate ruling of the habeas court against the relevant bail factors to ensure that the court did not abuse its discretion.").

We review questions of law de novo. *See Nguyen v. State*, 359 S.W.3d 636, 641 (Tex. Crim. App. 2012) (statutory construction questions reviewed de novo); *Sandifer v. State*, 233 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2007, no pet.). When interpreting a statute, our goal is to effectuate the "'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d

782, 785 (Tex. Crim. App. 1991). To determine this, "we begin by examining the literal text" as "the best means to determine 'the fair, objective meaning of that text at the time of its enactment.'" *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015) (quoting *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011)). "If the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning unless doing so would cause an absurd result." *Id.* We may also consider "common law or former statutory provisions, including laws on the same or similar subjects." TEX. GOV'T CODE § 311.023 (Code Construction Act). We presume that "the entire statute is intended to be effective" and that "a just and reasonable result is intended." TEX. GOV'T CODE § 311.021.

II. Bail Bonds

A. Bail balances the presumption of innocence with the State's interest in assuring the defendant's appearance at trial.

Bail effectuates the release from custody of a person accused of a crime, but legally presumed innocent, while securing his presence in court at his trial. *See Ex parte Anderer*, 61 S.W.3d 398, 402 (Tex. Crim. App. 2001); *Ex parte Bleimeyer*, No. 01-16-00838-CR, 2017 WL 586509, at *1 (Tex. App.—Houston [1st Dist.] Feb. 14, 2017, no pet.) (mem. op.; not designated for publication); *see also* TEX. CONST., art. 1, § 11, Interpretive Commentary. The amount of bail should be set sufficiently

high to give reasonable assurance that the accused will comply with the undertaking but should not be set so high as to be an instrument of oppression. *Ex parte Bufkin*, 553 S.W.2d 116, 118 (Tex. Crim. App. 1977); *Montalvo*, 315 S.W.3d at 596. "The practice of admission to bail, as it has evolved in Anglo–American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." *Stack v. Boyle*, 342 U.S. 1, 7–8 (Jackson, J., concurring) (citations omitted); *see Ex parte McDonald*, 852 S.W.2d 730, 732 (Tex. App.—San Antonio 1993, no writ).

The Code of Criminal Procedure defines "bail" as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond." TEX. CODE CRIM. PROC. art. 17.01. A "bail bond" is "a written undertaking entered into by the defendant and the defendant's sureties for the appearance of the principal therein before a court or magistrate to answer a criminal prosecution." *Id.* art. 17.02. Alternatively, the defendant may deposit cash into the court's registry in lieu of having sureties, or the trial court may require only the accused's personal assurance that he will appear. *Id*. The amount of bail is "regulated by the court, judge, magistrate or officer taking the bail," whose discretion must be exercised in accordance with the Constitution and the rules set out in article 17.15. *Id.* art. 17.15.

B. The amount of bail must be set in accordance with law.

"The appropriate amount of bail is an individualized determination." *Ex parte Dupuy*, 498 S.W.3d 220, 233 (Tex. App.—Houston [14th Dist.] 2016, no pet.).[5] The Texas Legislature has provided guidelines for setting the amount of pretrial bail:

> The amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion by the Constitution and by the following rules:
>
> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
>
> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
>
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
>
> 5. The future safety of a victim of the alleged offense and the community shall be considered.

TEX. CODE CRIM. PROC. art. 17.15.

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[5] Courts will often review recent cases involving the setting of bail when the charged offense is the same or similar. *E.g.*, *Ex parte Estrada*, 398 S.W.3d 723, 727 (Tex. App.—San Antonio 2008, no pet.) (compiling cases involving bail when defendant charged with burglary). However, the usefulness of case law as a comparator is limited by the "changing value of money" over time, *see Dupuy*, 498 S.W.3d at 233, and "because appellate decisions on bail matters are often brief and avoid extended discussions" making it difficult to determine whether the circumstances in cases are similar. *Ex parte Beard*, 92 S.W.3d 566, 571 (Tex. App.—Austin 2002, pet. ref'd).

The court may also consider: (1) the accused's work record; (2) the accused's family and community ties; (3) the accused's length of residency; (4) the accused's ability to make the bond; (5) the accused's prior criminal record; (6) the accused's conformity with the conditions of any previous bond; (7) the existence of outstanding bonds; and (8) aggravating circumstances alleged to have been involved in the offense. *See Rubac*, 611 S.W.2d at 849–50; *Liles v. State*, 550 S.W.3d 668, 669–70 (Tex. App.—Tyler 2017, no pet.). Our consideration of the nature and circumstances of the offense requires that we take note of the range of punishment permitted by law in the event of a conviction. *E.g.*, *Ex parte Rodriguez*, 595 S.W.2d 549, 550 (Tex. Crim. App. 1980); *Ex parte Reyes*, 4 S.W.3d 353, 355 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

"The ability or inability of an accused to make bail, however, even indigency, does not alone control in determining the amount of bail." *Milner v. State*, 263 S.W.3d 146, 150 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see Ex parte Charlesworth*, 600 S.W.2d 316, 317 (Tex. Crim. App. 1980); *Ex parte Branch*, 553 S.W.2d 380, 382 (Tex. Crim. App. 1977); *Ex parte Hulin*, 31 S.W.3d 754, 759 (Tex. App.—Houston [1st Dist.] 2000, no pet.). "If the ability to make bond in a specified amount controlled, the role of the trial court in setting bond would be completely eliminated and the accused would be in the position to determine what his bond

should be." *Milner*, 263 S.W.3d at 150; *see Ex parte Miller*, 631 S.W.2d 825, 827 (Tex. App.—Fort Worth 1982, pet. ref'd).

C. Ordinarily a defendant must give bail only once, but the statute includes limited exceptions.

Article 17.09 of the Texas Code of Criminal Procedure provides limited exceptions to the general rule that a defendant is ordinarily required to post a bail bond once in a criminal proceeding. It states that, once a defendant gives bail, the "bond shall be valid and binding upon the defendant and his sureties, if any, thereon, for the defendant's personal appearance before the court . . . ." TEX. CODE CRIM. PROC. art. 17.09, § 1. The statute provides that a person may not be required to give bail twice in the same criminal action, *see id.* art. 17.09, § 2, except in the following circumstances:

> Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending **finds** that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

Id. art. 17.09, § 3 (emphasis supplied).

III. The trial court abused its discretion by revoking Gomez's bonds and setting a new amount of bail.

Gomez and the State dispute the proper construction of the statutory exceptions. Gomez argues that in the absence of "good and sufficient cause," the court erred by revoking his bail bonds and resetting the amount of bail to $75,000 per charged offense. The State argues that the statute authorizes the trial court's action whenever the court finds that the bail bond was "insufficient in amount" and that no "good cause" finding is required.

In revoking the bond set by the magistrate judge and increasing the amount of bail, the trial court was required by law to make a finding based on governing legal principles and evidence that one of the conditions in article 17.09, § 3 was satisfied. It made no such finding. Nor could it have done so under the circumstances in this case, as none of the evidence before it at the November 15 and 18, 2019 bond hearings supported revoking the original bond, rearresting Gomez, and increasing the amount of bail under the factors that both the trial court and this court are required to consider.

In this case, there is no dispute that the magistrate set the amount of bail at $25,000 on the burglary of a habitation charge and $15,000 on the assault on a family member charge. The recording from the magistration shows that she considered the factors relevant to setting bail including Gomez's personal history, his ties to the community, the seriousness of the offense, and the risk to the complainant and the

community. There is no dispute that bail was given in the amount of $40,000 on the two cases. Because it is undisputed that the bonds were not "insufficient in amount" to satisfy the amount of bail that was ordered, the trial court could not have properly revoked Gomez's bonds and increased the amount of bail under section 1 of article 17.09.

There is also no showing of any circumstances that changed in the roughly 30 hours that passed between the time the magistrate set the amount of bail and the time the trial court increased the amount of bail from $40,000, combined, to $150,000, combined. No new evidence became available, and the indictments were not returned until Monday, November 18, 2019. The only new information was that Gomez had given bail and appeared in court. There was no information on which the court could find a change in the balance of the State's interest in assuring Gomez's presence at trial as compared with the interest in preserving the presumption of innocence. We conclude that no "other good or sufficient cause" for revoking Gomez's bond, rearresting him, and ordering that he give bail in a higher amount is presented by the record in this appeal.

Case law accords with this analysis. To satisfy the "other good or sufficient cause" exception to the one-bond rule, there must be some new or changed circumstances from which the court can conclude that some good or sufficient cause

exists for revoking a bond and setting a different bond.[6] For example, in *Liles v. State*, 550 S.W.3d 668 (Tex. App.—Tyler 2017, no pet.), the defendant posted bail based on indictments that alleged he recklessly caused serious bodily injury to two children. 550 S.W.3d at 669. He appeared at about 13 docket calls over two years. *Id.* at 671. The State then obtained new indictments that alleged that the defendant had intentionally and knowingly caused serious bodily injury to both children. *Id.* at 669. These indictments alleged first-degree felonies, with a higher range of punishment than under the prior indictments.[7] *Id.* The trial court increased the amount of bail from $20,000 on each case to $250,000 on each case. *Id.*

The court of appeals noted that although the defendant had appeared at numerous docket calls after giving bail at the lower amount of $20,000 for each offense, the new indictments altered the analysis because they alleged offenses with

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6 *See Ex parte King*, 613 S.W.2d 503, 504–05 (Tex. Crim. App. 1981) (trial court abused its discretion by revoking bond and requiring another when accused's counsel filed motion for continuance); *Liles v. State*, 550 S.W.3d 668, 671 (Tex. App.—Tyler 2017, no pet.) (no abuse of discretion for revoking bond and requiring another when reindictment alleged aggravating circumstances that increased the gravity of the charged crime); *Meador v. State*, 780 S.W.2d 836, 837 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (trial court abused its discretion by revoking bond and requiring another when accused arrived late for hearing and had not retained lawyer). In both *King* and *Meador*, the trial court revoked the bonds based on the occurrence of some other event; the cases were reversed on appeal because the appellate courts determined that those events did not constitute good and sufficient cause. *See King*, 613 S.W.2d at 505; *Meador*, 780 S.W.2d at 837.

7 The new indictments alleged that the defendant had intentionally and knowingly caused serious bodily injury to both children. *Liles*, 550 S.W.3d at 669.

greatly increased punishment ranges, including the possibility of life in prison. *Id.* at 671. The court of appeals found that the trial court did not abuse its discretion under article 17.09 because it was "entirely reasonable for the trial judge to believe that a $20,000 personal bond might be insufficient to assure" the defendant's appearance at trial. *Id.*

In *Hernandez v. State*, 465 S.W.3d 324 (Tex. App.—Austin 2015, pet. ref'd), the defendant was charged with aggravated robbery and bail was set at $75,000. 465 S.W.3d at 325. Ninety days later, he was released on a $25,000 personal recognizance bond because the State was not yet ready for trial. *Id.* at 325–26 (citing TEX. CODE CRIM. PROC. art. 17.151). Several weeks later, the State obtained an indictment and filed a motion to increase bond. *Id.* at 326. After an ex parte hearing, the court signed an order requiring the defendant to give bail in the amount of $75,000. *Id.* The trial court denied the defendant's application for writ of habeas corpus, and he appealed. *Id.*

On appeal, the defendant argued that the court had abused its discretion under article 17.09, section 3. *Id.* The court of appeals reasoned that because section 4 of article 17.09 expressly prohibits a court from imposing a higher bond when a defendant exercises his right to counsel, the statute implicitly permits the court "to do so for other reasons, such as a reevaluation of the circumstances and the adequacy of a defendant's bond." *Id.* at 326–27. The court of appeals then noted that two

circumstances had changed between the time when the defendant was released and when the court ordered that he give bail in the amount of $75,000. *Id.* at 327. First, the defendant was indicted, and second additional physical evidence became available that linked the defendant to the crime. *Id.* The trial court had issued findings of fact, in which it stated that it had considered the indictment, the probable cause allegations, the physical evidence, the threat to the victim and the community, the seriousness of the offense, and the likelihood that the defendant would appear for trial. *Id.* The court of appeals held that the trial court had not abused its discretion by finding that the defendant's "personal recognizance bond was no longer sufficient and in reinstating the original requirement for a $75,000 bond." *Id.*

We contrast these cases with this case, in which no good and sufficient cause was shown for revoking Gomez's bail, rearresting him, and more than doubling the amount of the bail and in which the trial court made no findings of fact at all. We therefore hold that the trial court abused its discretion by taking those actions. We sustain Gomez's first issue.

Having sustained Gomez's first issue, we do not need to address his second issue, in which he raised several procedural and due process challenges to the trial court's action. *See* TEX. R. APP. P. 47.1.

Conclusion

We reverse the trial court's order denying Gomez's application for a pretrial writ of habeas corpus, and we render judgment granting the writ and reinstating Gomez's prior bonds. We dismiss any pending motions as moot. The Clerk of the Court is instructed to issue the mandate immediately. *See* TEX. R. APP. P. 2 (suspension of rules), 18.1(c) (issuance of mandate).

Peter Kelly
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

Do not publish. TEX. R. APP. P. 47.2(b).

Appendix B

Email receipt showing State's petition for discretionary review filed on August 10.

From: No-Reply@eFileTexas.gov
To: Morgan, Clinton
Subject: Filing Submitted for Case: 45220557; ; Envelope Number: 45220557
Date: Monday, August 10, 2020 1:26:38 AM

Filing Submitted

Envelope Number: 45220557
Case Number: 45220557
Case Style:

The filing below has been submitted to the clerk's office for review. Please allow 24 - 48 hours for clerk office processing.

Filing Details	
Court	Courts of Appeals
Date/Time Submitted	8/10/2020 1:23 AM CST
Filing Type	Petition for Discretionary Review
Filing Description	State's Petition for Discreationary Review
Type of Filing	EFileAndServe
Filed By	Clinton Morgan
Filing Attorney	Clinton Morgan

Fee Details	
Your account is never charged until your filing is accepted. If you see any pending charges on your account prior to acceptance, this is an authorization hold to ensure the funds are available so your filing can be accepted without delay. If the filing is canceled or rejected these funds will be released and will return to your account according to your financial institution's policies (typically 3-10 business days).	
Waiver Selected	
Case Fees	$0.00
Petition for Discretionary Review	$0.00
Grand Total	$0.00
Total:$0.00	

Document Details	
Lead Document	PDR - Gomez - PD-0556-20.pdf
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Associated Case Party: Joseph Gomez

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